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7 UNITED STATES DISTRICT COURT  
8 DISTRICT OF NEVADA  
9 RENO, NEVADA  
10  
11

12 UNITED STATES OF AMERICA,

In Equity No. C-125-B

13 Plaintiff,

14 WALKER RIVER PAIUTE TRIBE

15 Plaintiff-Intervenor

16 vs.

ORDER

17 WALKER RIVER IRRIGATION DISTRICT,  
18 a corporation, et. al.,

19 Defendants.  
20 \_\_\_\_\_/

21 I. PROCEDURAL HISTORY  
22

23 The United States of America (hereinafter "United States")  
24 and the Walker River Paiute Tribe (hereinafter "the Tribe") filed  
25 a motion for class certification on May 4, 2001 (#142). The State  
26 of Nevada opposed (#150) on June 14, 2001, as did the Walker River

1 Irrigation District (#151) on June 18, 2001. The United States  
2 and the Tribe replied (#158) on August 3, 2001.

3 The magistrate judge issued his report and recommendation  
4 (#164) on September 13, 2001. The magistrate judge recommended  
5 that the motion for certification be denied.

6 The United States and the Tribe filed objections (#167) on  
7 October 26, 2001, and the Walker River Irrigation District filed  
8 points and authorities in reply (#169) on November 30, 2001. We  
9 issued our order (#172) denying the motion. This memorandum sets  
10 forth our explanation of our decision in that order.

## 11 II. BACKGROUND

12  
13 In this order we consider the motion on behalf of the United  
14 States and the Tribe to certify two defendant classes. The  
15 classes come from categories we established in our case management  
16 order (#108). The first proposed class consists of members of  
17 category 3(a): successors in interest to all water rights holders  
18 under the decree of 1936. The second proposed class consists of  
19 members of category 3(c) who hold permits or certificates to pump  
20 groundwater in sub-basins 107, 108, 110A and 110B in the Walker  
21 River basin.

22 In our case management order we also established various  
23 phases for the case. We required that at the outset of the  
24 litigation concerning the United State and the Tribe's  
25

1 counterclaims, the magistrate judge would determine a list of  
2 threshold issues. These issues would include, among others,  
3 jurisdiction, claim preclusion, applicable law, and any defenses  
4 which may apply. We designated these threshold issues as "Phase  
5 I." The remainder of the case would involve the determination of  
6 the merits of all matters relating to the claims of the United  
7 States and the Tribe. These we refer to as the "Phase II" issues.  
8 Part of the Phase II issues involve declaratory and injunctive  
9 relief; the United States and the Tribe seek a declaration of  
10 their rights to water in the Walker River and an injunction  
11 preventing the other water right holders from claiming and using  
12 the water.  
13

14 The United States and the Tribe seek to certify classes  
15 consisting of category 3(a) and the specified members of category  
16 3(c) for the purposes of determining the Phase I threshold issues  
17 and the Phase II injunctive and declaratory issues.

18 **A. Review of Report and Recommendation**

19 Certification of a class action falls within the category of  
20 cases that a magistrate judge does not have the authority to  
21 determine. 28 U.S.C. § 636 (b)(1)(A); Langley v. Coughlin, 715 F.  
22 Supp 522, 529 (S.D.N.Y. 1989). In these cases, the magistrate  
23 judge may issue proposed findings of fact and recommendations for  
24 disposition. 28 U.S.C. § 636 (b)(1)(B); Fed. R. Civ. P. 72(a);  
25

1 Langley, 715 F. Supp. at 529. When objections are filed " [A]  
2 judge of the court shall make a de novo determination of those  
3 portions of the report or specified proposed findings or  
4 recommendations as to which objection is made." 28 U.S.C. §  
5 636(b)(1).

6 In our case, the United States and the Tribe made three  
7 objections to the report and recommendation: (1) the determination  
8 that the United States and the Tribe had not met the numerosity  
9 requirement of Fed. R. Civ. P. 23(a); (2) the determination that  
10 the United States and the Tribe could not satisfy any of the  
11 subsections of Fed. R. Civ. P. 23(b); and (3) the final  
12 recommendation of the magistrate judge denying class  
13 certification. We review de novo the determination of numerosity,  
14 the determination under Fed. R. Civ. P. 23(b), and the final  
15 conclusion of the magistrate judge. Although we do not have to  
16 review the remainder of the report and recommendation, Thomas v.  
17 Arn, 474 U.S. 140, 149-152 (1985), we do so because the rights at  
18 stake in this case are extremely important.  
19

### 20 III. ANALYSIS

21 Class certification under Fed. R. Civ. P. 23 requires the  
22 United States and the Tribe to demonstrate that their proposed  
23 classes meet the four requirements of Fed. R. Civ. P. 23(a) and  
24 then satisfy the requirements of one of the three parts of 23(b).  
25  
26

1 Mantolete v. Bloger, 767 F.2d 1416, 1424 (9th Cir. 1985). The  
 2 district court has the discretion to grant or deny class  
 3 certification. Local Joint Exec. Board of Culinary/Bartender  
 4 Trust Fund v. Las Vegas Sands, Inc., 244 F.3d 1152, 1161 (9th Cir.  
 5 2001); SP/4 A.R. Montgomery, IV v. Rumsfeld, 572 F.2d 250, 255  
 6 (9th Cir. 1978) (stating that grant or denial of class  
 7 certification is a "matter within the discretion of the trial  
 8 court"); cf. Califano v. Yamasaki, 442 U.S. 682, 701 (1978)  
 9 (holding that if the district court had jurisdiction to hear a  
 10 case under section 205(g) of the Social Security Act, it also had  
 11 the discretion to certify a class). The determination of class  
 12 certification "does not permit or require a preliminary inquiry  
 13 into the merits." Hernandez v. Alexander, 152 F.R.D. 192, 194 (D.  
 14 Nev. 1993). However, it is our job to conduct a "rigorous  
 15 analysis" to determine whether the requirements of Fed. R. Civ. P.  
 16 23 have been met. General Telephone Co. of Southwest v. Falcon,  
 17 457 U.S. 147, 161 (1982).

18  
 19 A. Fed. R. Civ. P. 23(a)

20 There are four requirements of Fed. R. Civ. P. 23(a): (1) the  
 21 class is so numerous that joinder of all members is impracticable;  
 22 (2) there are questions of law or fact common to the class; (3)  
 23 the claims or defenses of the representative parties are typical  
 24 of the class; and (4) the representative parties will fairly and  
 25

1 adequately protect the interest of the class. We address each in  
2 turn.

3 **1. Numerosity**

4 A class may be certified only if it is "so numerous that  
5 joinder of all members is impracticable." Impracticable does not  
6 mean impossible. Hum v. Dericks, 162 F.R.D. 628, 633-34 (D. Haw.  
7 1995); In re Activision Sec. Litg., 621 F.Supp 415, 433 (N.D. Cal.  
8 1985). The standard is satisfied if there is great difficulty and  
9 inconvenience in joining all of the members of the proposed class.  
10 Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14  
11 (9th Cir. 1964). Determination of numerosity is fact specific and  
12 there are no absolute limitations. General Telephone Co. of the  
13 Northwest v. EEOC, 446 U.S. 318, 330 (1980). The court may  
14 consider a number of factors in its numerosity analysis, such as  
15 "class size, ease of identification of members of the proposed  
16 class, geographic distribution of the class members, and the  
17 ability of the class members to pursue individual actions." Olden  
18 v. LaFarge Corp., 203 F.R.D. 254, 268 (E.D. Mich. 2001) (quoting  
19 Kruger v. Gast, 197 F.R.D. 310, 314 (W.D. Mich. 2000)). Further  
20 factors for consideration include "the nature of the relief  
21 sought, the ability of the individuals to pursue their own claims,  
22 the practicality of forcing relitigation of a common core of  
23 issues, and administrative difficulties involved in interpretation  
24  
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1 and joinder." Rosario v. Cook County, 101 F.R.D. 659, 661 (N.D.  
2 Ill. 1983).

3 The United States and the Tribe present four main arguments  
4 as to why joinder is impracticable: (1) there are a large number  
5 of parties in class 3(a) and the class 3(c) sub-basins; (2) the  
6 parties are geographically dispersed; (3) the parties are actively  
7 resisting service of process; and (4) the United States and the  
8 Tribe are having difficulty identifying the water rights holders.

9 In addition to the factors presented by the United States and  
10 the Tribe we also consider the administrative difficulties in  
11 joinder. Our decision on the factors to consider is guided by an  
12 analysis of the factors that are most applicable to defendant  
13 class actions, as opposed to those that appear to be applicable to  
14 plaintiff class actions.  
15

16 The United States and the Tribe have identified over 1,000  
17 people who would fit into the 3(a) category, and over 1,000 people  
18 who would fit into category 3(c). Based upon numbers alone this  
19 case fits the numerosity requirement. However, numbers alone are  
20 not dispositive of the numerosity factor. Hum, 162 F.R.D. at 634.

21 The United States and the Tribe have noted that although the  
22 water rights exist only in a few valleys, the water rights  
23 holders, those who must be served, are geographically dispersed.  
24 It is not exactly clear what percentage of the water rights  
25  
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1 holders reside outside of the valleys, but it is clear that the  
2 water rights holders are geographically dispersed. This factor  
3 makes it more "impracticable" to join all of the parties.

4 The court does not find persuasive the arguments that service  
5 will be difficult, because certain water rights holders are  
6 actively resisting service of process. Defendants never want to  
7 be served, especially in a case like this where the outcome of the  
8 litigation may very well be a reduction or elimination of their  
9 water rights. We recognized this difficulty when we noted in the  
10 case management order that after the United States and the Tribe  
11 attempted service of process they could apply for service by  
12 publication pursuant to Fed. R. Civ. P. 4. This would take care  
13 of the problems with those defendants who actively resist service.  
14

15 We have recognized that there are difficulties with the  
16 identification of water rights holders on the Walker River. In  
17 our order denying the motion to require a list of current water  
18 rights holders in C-125 we stated our understanding of the  
19 frustrations of identifying all of the parties and accomplishing  
20 service, instead of focusing on the merits. However, we believe  
21 that the United States and the Tribe would have a less difficult  
22 time with identification, joinder, and service than has faced  
23 Mineral County.  
24

25 As demonstrated by all of the motions, the United States and  
26



1 the Tribe have a paralegal, Mr. Becker, devoted to the review and  
2 identification of the water rights holders who must be joined in  
3 this action. Currently Mr. Becker has identified over 2,000 water  
4 rights holders for this case. His methods appear to be effective  
5 in identifying those parties who must be joined. In addition,  
6 the United States and the Tribe also have the resources of the  
7 United States government to aid in the actual service of process.  
8 Therefore, we are not persuaded by a comparison of the situation  
9 in the Mineral County case.

10  
11 We find that the United States and the Tribe have satisfied  
12 the numerosity requirement. Even though it is possible to  
13 identify, join, and serve all of the water rights holders, the  
14 large number of parties, and their geographic disbursement make  
15 joinder of all members impracticable.

## 16 2. Commonality

17 The United States and the Tribe must demonstrate at least one  
18 question of law or fact common among the class. Blackie v.  
19 Barrack, 524 F.2d 891, 904 (9th Cir. 1975) (stating that the  
20 standard for commonality is minimal because only one common issue  
21 of law or fact is required). The magistrate judge found that  
22 issues of law or fact were common, as set forth in the case  
23 management order. We agree. The Phase I threshold issues present  
24 questions of law that will apply to all parties. The United States  
25

1 and the Tribe have demonstrated the commonality factor.

2 **3. Typicality**

3 The claims and defenses of the class representative must be  
4 typical of the class. However, they do not need to be identical.  
5 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).

6 The typicality factor should be construed broadly, and exists  
7 to ensure that interests of the named representatives are aligned  
8 with the rest of the class members. International Molders and  
9 Allied Workers Local Union No. 164 v. Nelson, 102 F.R.D. 457 (N.D.  
10 Cal. 1983). Defenses are typical if they "stem from a single  
11 event or are based on the same legal or remedial theory." Paxton  
12 v. Union Nat'l Bank, 688 F.2d 552, 561 (8th Cir. 1982). The court  
13 considers the nature of the defense, not the specific facts from  
14 which the defense arose. Hanon v. Dataproducts Corp., 976 F.2d  
15 497, 508 (9th Cir. 1992).

17 The Walker River Irrigation District and the State of Nevada  
18 both argue that their defenses are not typical of the class. The  
19 magistrate judge found that with respect to the Phase I, the  
20 defenses of the Walker River Irrigation District and the State of  
21 Nevada would be typical of the class. We disagree as to the State  
22 of Nevada, but agree as to the Walker River Irrigation District.

23 The United States and the Tribe proposed the State of Nevada  
24 as the class representative for the domestic well users. Although  
25

1 there are common questions of law and fact between the State of  
2 Nevada and the domestic well users, the State of Nevada will not  
3 have typical claims and defenses. The state's focus will be on its  
4 decreed rights on the Walker River and its permit to flood waters  
5 in Walker Lake. The claims and defenses for these surface water  
6 rights differ significantly from the claims and defenses of  
7 domestic well owners who rely on groundwater.

8       The United States and the Tribe proposed the Walker River  
9 Irrigation District as the class representative for those parties  
10 who are successors in interest to the decreed rights on the Walker  
11 River. Although the Walker River Irrigation District is not an  
12 irrigator, it appears that its claims and defenses would be  
13 typical of the class. The District does hold water rights on the  
14 Walker River for various purposes, even though it is not a direct  
15 irrigator. It appears that the claims and defenses that the  
16 District would put forth would be typical of those of other water  
17 rights holders on the Walker River; the claims and defenses would  
18 flow from the fact that the party possessed a water right, and the  
19 specific end use of the water would not affect the claims and  
20 defenses.  
21

22       We find that the State of Nevada would not have typical  
23 claims and defenses, and, therefore, is not an appropriate class  
24 representative. We find that the Walker River Irrigation District  
25

1 would have typical claims and defenses. If the United States and  
2 the Tribe can satisfy the remainder of the Fed. R. Civ. P. 23  
3 requirements for their proposed class, the Walker River Irrigation  
4 District could be the class representative.

5 **4. Adequacy of Representation**

6 There are two main qualifications for the class member to  
7 adequately represent the class: the class representative must have  
8 a sufficient interest in the outcome of the case to ensure that  
9 they vigorously defend the actions, and the class representative  
10 may not have interests in conflict with those of the other members  
11 of the class. Mego Financial Corp. Sec. Litg v. Nadler, 213 F.3d  
12 454, 462 (9th Cir. 2000); Lerwill v. Inflight Motion Pictures,  
13 Inc., 582 F.2d 507, 512 (9th Cir. 1978). A court will consider a  
14 conflict to defeat a class only when that conflict is at the heart  
15 of the case. Blackie, 524 F.2d at 909; Winkler, 205 F.R.D. at  
16 242. The class representative does not have to have identical  
17 interests with those of the class.  
18

19 The magistrate judge found that the proposed representatives,  
20 the Walker River Irrigation District and the State of Nevada,  
21 would not have any conflicts with the class as a whole that would  
22 prevent them from serving as the class representatives. We agree.  
23 The defendants share a common goal; to ensure that the United  
24 States and the Tribe do not acquire any more water rights. While  
25  
26

1 the individual interests may be different, the Walker River  
2 Irrigation District and the State of Nevada do not have  
3 conflicting interests with the rest of the class members.

4 In sum, we find that the United States and the Tribe have  
5 satisfied their burden of demonstrating that the proposed class of  
6 the successors in interest under the decree meet the tests of Fed.  
7 R. Civ. P. 23(a). However, we find that the United States and the  
8 Tribe have not met their burden with respect to the proposed class  
9 of the domestic well owners, because they have failed to  
10 demonstrate that the State of Nevada would have claims and  
11 defenses typical of the class.  
12

13 **B. Fed. R. Civ. P. 23(b)**

14 The United States and the Tribe must also demonstrate that  
15 their proposed class fits under one of the three subsections of  
16 Fed. R. Civ. P. 23(b). Mantolete v. Bloger, 767 F.2d 1416, 1424  
17 (9th Cir. 1985).

18 **1. 23 (b) (1)**

19 Fed. R. Civ. P. 23(b) (1) (A) allows a class action when  
20 separate actions may result in adjudications that would result in  
21 "incompatible standards of conduct for the party opposing the  
22 class." Fed. R. Civ. P. 23(b) (1) (B) allows a class action when  
23 separate actions could prevent non-party class members from  
24 adequately protecting their interests.  
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1       The magistrate judge found that subpart(b)(1) did not apply  
2 to this case because there can be no other adjudications: all  
3 parties and claims to the Walker River that could be impacted by  
4 the claims of the United States and the Tribe must be joined in  
5 this action. This is the correct conclusion. Therefore, a class  
6 action cannot be certified under (b)(1).

7  
8       2.    23(b)(2)

9       There is great dispute over whether Fed. R. Civ. P. 23(b)(2)  
10 can be used for defendant class actions. See e.g. David H. Taylor,  
11 Defendant Class Actions Under Rule 23 (b)(2): Resolving the  
12 Language Dilemma, 40 U. Kan. L. Rev. 77 (1991); Angelo N. Ancheta,  
13 Defendant Class Actions and Federal Civil Rights Litigation, 33  
14 UCLA L. Rev. 283 (1985); Scott Douglas Miller, Certification of  
15 Defendant Class Actions Under Rule 23(b)(2), 84 Colum. L. Rev.  
16 1371 (1984).

17       The literal reading of the rule seems to indicate that the  
18 rule is only applicable to plaintiff class actions. This  
19 interpretation has been followed by some circuits. Henson v. East  
20 Lincoln Township, 814 F.2d 410 (7th Cir. 1987); Thompson v. Board  
21 of Educ., 709 F.2d 1200 (6th Cir. 1983); Paxman v Campbell, 612  
22 F.2d 848 (4th Cir. 1980). Other circuits have determined that the  
23 rule may be applied to certify either a plaintiff or a defendant  
24 class, notwithstanding the rule's specific language. Brown v.  
25

1 Vance, 637 F.3d 272 (5th Cir. 1981); Marcera v. Chinlund, 595 F.2d  
2 1231 (2d Cir. 1979) vacated on other grounds sub nom Lombard v.  
3 Marcera, 442 U.S. 915 (1979).

4 The magistrate judge denied certification on the basis that  
5 the rule only provides for plaintiff class actions under (b) (2).  
6 However, the Ninth Circuit has recognized a defendant class action  
7 under Fed. R. Civ. P. 23(b) (2) in a case involving a lawsuit  
8 brought by Indians seeking hunting and fishing rights on property  
9 owned by Simpson Timber Co. Blake v. Arnett, 663 F.2d 906, 912  
10 (9th Cir. 1981). The timber company sought class certification to  
11 determine whether the tribal members had the right to hunt and  
12 fish on its land. Id. The district court certified a class of  
13 cross-defendants for this purpose. Id. The Ninth Circuit affirmed  
14 the creation of the class under Fed. R. Civ. P. 23(b) (2) stating  
15 "Simpson's position is the same as to all of them so that final  
16 injunctive or declaratory relief is appropriate with respect to  
17 the class as a whole." Id. at 912-13.

18  
19 Even though the Ninth Circuit has affirmed the use of Fed. R.  
20 Civ. P. 23 (b) (2) for defendant class actions, the within case  
21 does not qualify. The threshold issues involve questions of  
22 applicable law, jurisdiction and defenses to the claims of the  
23 United States and the Tribe, not issues of injunctive and  
24 declaratory relief. The United States and the Tribe are not  
25

1 asking for primarily injunctive or declaratory relief, even though  
2 that is part of their claims in Phase II. The heart of the  
3 litigation is their desire for additional water from the Walker  
4 River. See e.g. Eisen v. Carlisle & Jacqueline, 391 F.2d 555, 564  
5 (2d Cir. 1968) (stating that "subsection b(2) was never intended  
6 to cover cases. . . where the primary claim is for damages")  
7 Therefore, the class cannot be certified under subsection (b)(2).

8  
9 3. 23(b)(3)

10 Under Fed. R. Civ. P. 23(b)(3) a class may be certified if  
11 common questions of law or fact predominate, and the class action  
12 is the superior method of adjudicating the case.

13 a. Predominance

14 In order to maintain a class action the common issues must  
15 predominate over individual issues. Amchem Prods v. Windsor, 521  
16 U.S. 591, 623 (1997). The predominance inquiry "tests whether  
17 proposed classes are sufficiently cohesive to warrant adjudication  
18 by representation." Id. The inquiry under the predominance test  
19 focuses on the relationship between the common and individual  
20 issues. Local Joint Exec. Board of Culinary/Bartender Trust Fund  
21 v. Las Vegas Sands, Inc., 244 F.3d 1152, 1162 (9th Cir. 2001).

22 It does not appear that common issues predominate over  
23 individual issues. The threshold issues involve determinations of  
24 what law to apply to the interaction of groundwater and surface  
25



1 water. There are three possible groups of defendants: those who  
2 possess both groundwater and surface water rights, those who  
3 possess only groundwater rights, and those who possess only  
4 surface water rights. Each group will have different issues that  
5 will be important. The positions of the defendants are likely to  
6 come from the individual water rights they hold, not from the  
7 categories of service that the court required.

8 b. Superior Method

9 Superiority requires that the class action be superior to other  
10 methods for the fair and efficient adjudication of the controversy."  
11 Fed. R. Civ. P. 23(b)(3); Lienhart v. Dryvit Sys. Inc., 255 F.3d  
12 138, 147 (4th Cir. 2001). In the consideration of superiority the  
13 court should take into account factors such as conserving time,  
14 effort and expense. Nicodemus v. Union Pac. Corp., 204 F.R.D. 479,  
15 493 (D. Wy. 2001); see also Talbott v. GC Serv. Ltd. Partnership,  
16 191 F.R.D. 99, 106 (W.D. Va. 2000) ("Efficiency is the primary focus  
17 to determine if a class action is the superior method . . . the  
18 court looks to judicial integrity, convenience, and economy.") We  
19 agree with the conclusion of the magistrate judge that the potential  
20 class action must be measured against the process set out in the  
21 case management order for adjudication of the claims. We consider  
22 the four factors of Fed. R. Civ. P. 23(b)(3) in our determination as  
23 to whether the class action is superior. We are not limited to  
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1 these factors, and we also take into account the unique nature of  
2 this case in our determination. In our consideration of the factors  
3 our focus is on the efficiency and economy elements. Winkler v. DTE  
4 Inc., 205 F.R.D. 235, 244 (D. Az. 2001).

5 Some of the 23(b)(3) factors are not applicable in this case.  
6 For example, 23(b)(3)(B) deals with other litigation that has  
7 already commenced, and 23(b)(3)(C) deals with the desirability of  
8 concentrating the claims in a single forum. Our case management  
9 order requires that parties and claims to the Walker River that  
10 could be impacted by the claims of the United States and the Tribe  
11 be joined in this action.  
12

13 The United States and the Tribe argue that a class action would  
14 be beneficial for the preliminary claims and the declaratory relief  
15 for the following reasons: (1) the process would move faster with  
16 fewer attorneys; (2) the United States and the Tribe would simply  
17 have to provide all of the parties with notice, they would not have  
18 to serve all of the individuals at this time; and (3) the individual  
19 defendants would have the ability to decide for themselves how to  
20 proceed with the litigation.

21 (1) Fewer Attorneys

22 The United States and the Tribe argue that with fewer attorneys  
23 the time to determine the threshold issues would be less, and the  
24 case would quickly move on to the determination of the substantive  
25

1 claims of Phase II.

2 Although there are benefits to creating two classes of  
3 defendants for this portion of the case, the class action is not a  
4 superior method. It may speed up the preliminary claims. However,  
5 in terms of the overall case, we do not see that certifying these  
6 classes would be a more efficient or economical way to proceed with  
7 the litigation. First, there would still be the additional  
8 individuals remaining in category 3(c), as well as the numerous  
9 individuals in 3(d) who own wells. The same problems with  
10 identification, joinder, and service would apply to them. Second,  
11 we are also persuaded by the argument, albeit not fully briefed,  
12 that there is overlap among these classes, and many of the parties  
13 would have to be served anyway. Third, we anticipate great  
14 difficulty in the management of the class action. Fed. R. Civ. P.  
15 23(b)(3)(D). Judging by the way this litigation has proceeded we  
16 foresee an additional extensive phase of litigation relating to the  
17 class action. For example, we predict the parties would litigate  
18 about type of notice provided, the selection of the class  
19 representative, the opt-out provision, and future litigation about  
20 the adequacy of the representation. See Andrews v. Am. Tel. & Tel.  
21 Co., 95 F.3d 1014, 1023 (11th Cir. 1996) (stating that the  
22 manageability factor includes "the whole range of practical problems  
23 that may render the class action format inappropriate for a  
24  
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26

1 particular suit").

2 (2) Elimination of Service of Process

3 We find it very persuasive that our case management order  
4 requires all of the parties to be served before determinations are  
5 made as to their water rights. Strangely, it seems that the way the  
6 class action device would be superior is if the United States and  
7 the Tribe were to receive no benefit from the preliminary issues and  
8 the declaratory relief. If the United States and the Tribe do  
9 receive some relief at the preliminary stage, as we suspect they  
10 may, they will be required to join and serve all of the individuals  
11 claiming water rights as identified in our case management order.  
12 Delaying service of process until after the threshold issues were  
13 determined would in the end not alter the time spent in litigation.  
14

15  
16 (3) Defendants may Opt-Out and determine how they wish to proceed

17 The United States and the Tribe also argue that the class  
18 action is superior because it gives the defendants in the proposed  
19 classes the ability to determine the way that they wish to proceed  
20 in the case: they can either remain in the class, if they feel that  
21 their interest is too small to justify the expense of retaining a  
22 private attorney, or they may opt out if they feel that their  
23 interests require more attention that would be given by the class  
24 representative.  
25

1       The United states and the Tribe argue that this benefit ties in  
2 with the opt-out provision. A class that is certified under Fed. R.  
3 Civ. P. 23(b)(3) requires notice to all class members and an  
4 opportunity for them to opt out of the class. Those who opt out  
5 must be served personally.

6       The magistrate judge found that the opt out provision would not  
7 be a reason that the class action would be superior. We agree. The  
8 main argument of the United States and the Tribe is that it would be  
9 easier to identify and serve those who opt out. The opt out  
10 provision was not designed to be a way to identify parties in order  
11 to effect service. We do not believe having many people opt out  
12 would make the class action a superior method of proceeding with  
13 this case. In addition, we feel that if the defendant members  
14 thought their interests would be best protected by a class, they  
15 would have moved to certify a class action.

16  
17       We are also persuaded that the class action is not the superior  
18 method by the fact that the determination of the preliminary issues  
19 would not be the end of our inquiry, but rather the start of a long  
20 process. See Doe I v. Guardian Life Ins. Co. of Am., 145 F.R.D. 466,  
21 478 (N.D. Ill. 1992) (holding that the common questions do not have  
22 to dispose of the entire action, but they should "provide a definite  
23 signal of the beginning of the end"). These preliminary issues are  
24 just that, preliminary. We anticipate that the majority of this  
25

1 litigation will be spent determining the water rights, if any, of  
2 the United States and the Tribe. See Wright v. Fred Hutchinson  
3 Cancer Research Center, 2001 WL 1782714, \*4 (W.D. Wash. 2001)  
4 (stating that because there would be a point where the class  
5 litigation would give way to individual litigation "under these  
6 circumstances, there are just too many individual issues for the  
7 court to manage for class adjudication to be deemed superior").

8 Overall, requiring the United States and the Tribe to identify,  
9 join, and serve all of the parties in the case before proceeding to  
10 the threshold issues would prevent future litigation, and will  
11 promote judicial economy. Therefore, a class action will not be a  
12 superior method.  
13

14 We conclude that the United States and the Tribe have not met  
15 their burden of demonstrating that their proposed classes fit under  
16 any of the subsections of Fed. R. Civ. P. 23(b).

#### 17 IV. CONCLUSION

18 The parties have spent considerable time and resources on  
19 purely procedural issues. The determination of these questions is  
20 important, and we have undertaken the required "rigorous analysis"  
21 in our consideration of whether a class action would be appropriate  
22 in this case. The United States and the Tribe have carried their  
23 burden of satisfying the requirements of Fed. R. Civ. P. 23(a) as to  
24 the Walker River Irrigation District, but not as to the State of  
25

1 Nevada. However, the United States and the Tribe have not been able  
2 to demonstrate that the proposed classes fit under any of the Fed.  
3 R. Civ. P. 23(b) categories.  
4

5 IT IS THEREFORE HEREBY ORDERED THAT, our previous order (#172)  
6 is confirmed and re-entered.  
7

8 IT IS THEREFORE HEREBY FURTHER ORDERED THAT, the report and  
9 recommendation of the magistrate judge (#164) is adopted and  
10 approved to the extent set forth above.

11 IT IS THEREFORE HEREBY FURTHER ORDERED THAT, the motion by the  
12 United States and the Tribe for certification of two defendant  
13 classes (#142) is DENIED.  
14

15  
16 DATED: April 26, 2002,

Edward C. Reed.

18 UNITED STATES DISTRICT JUDGE  
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